

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS  
PUBLIC UTILITIES COMMISSION**

**IN RE: IMPLEMENTATION OF THE REQUIREMENTS    )  
      OF THE FEDERAL COMMUNICATIONS            ) DOCKET 3550  
      COMMISSION'S TRIENNIAL REVIEW ORDER    )**

**COMMENTS BY THE DIVISION OF PUBLIC UTILITIES AND  
CARRIERS ON THE EXPEDITED MOTION OF VERIZON RHODE ISLAND  
TO STAY THIS PROCEEDING IMPLEMENTING THE  
FCC'S TRIENNIAL REVIEW ORDER**

This Docket finds its genesis in the FCC's Report and Order and Order On Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338 et al.<sup>1</sup> ("Triennial Review Order" or "the TRO"). The TRO set out standards under which the operations of Incumbent Local Exchange Carriers ("ILECs"), including Verizon New England, Inc., d/b/a Verizon Rhode Island ("Verizon Rhode Island"), could be found to impair Competitive Local Exchange Carriers ("CLECs") from competing with Verizon Rhode Island in mass markets for switching and/or dedicated transport for certain routes in Verizon Rhode Island's network. The TRO delegates to state regulatory commissions the authority to investigate and determine whether CLECs are "impaired."<sup>2</sup>

On December 8, 2003, Verizon Rhode Island filed testimony with the Rhode Island Public Utilities Commission ("Commission") to demonstrate that it complies with the standards set by the TRO. Verizon Rhode Island's December 8, 2003 filing includes testimony that addresses the costs associated with Verizon Rhode Island's activities for

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<sup>1</sup> FCC 03-36, 18 FCC Rcd 16978 (issued August 21, 2003).

<sup>2</sup> TRO, ¶¶ 486-90, 494-497, 504, 505-520.

processing “hot-cuts” for UNE elements.<sup>3</sup> On December 23, 2003, the Commission issued its Procedural Schedule governing its investigation of issues arising from the TRO,<sup>4</sup> and on February 24, 2004, in accordance with the Procedural Schedule, CLECs filed their testimony in response to Verizon Rhode Island’s December 23, 2003 filing.

On March 2, 2004, the United States Court of Appeals for the District of Columbia Circuit issued its Opinion in *United States Telecom Association v. Federal Communications Commission* (“*USTA II*”).<sup>5</sup> The Court of Appeals found to be unlawful the FCC’s delegation to state regulators of the authority to determine whether CLECs are impaired without access to network elements. Specifically, with respect to both mass market switching and dedicated transport, the Court of Appeals vacated the FCC’s subdelegation to the states of the FCC’s responsibilities under § 251(d)(2) of the Telecommunications Act of 1996<sup>6</sup> and remanded the FCC’s determinations with respect to mass market switching and certain dedicated transport elements.<sup>7</sup> As to the portions of the TRO that it vacated, the Court of Appeals delayed issuance of its mandate until the later of: (1) denial of any petition for rehearing or rehearing en banc, or (2) 60 days from March 2, 2004 (April 26, 2004).

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<sup>3</sup> A hot-cut is the simultaneous movement of a loop from one carrier’s switch to another carrier’s switch. The objective of a hot-cut is to effect the loop movement with little or no out-of-service period.

<sup>4</sup> Memorandum dated December 23, 2003 from Luly E. Massaro, Commission Clerk, to the Service List in Docket Nos. 3550 and 2681.

<sup>5</sup> *United States Telecom Association v. Federal Communications Commission* (Case No. 00-1012)(DC Circuit March 2, 2004).

<sup>6</sup> *USTA II* at 18.

<sup>7</sup> *USTA II* at 61, 62.

On March 3, 2004, Verizon Rhode Island filed its Expedited Motion Of Verizon Rhode Island To Stay This Proceeding Implementing The FCC's Triennial Review Order ("Motion"). In its Motion, Verizon Rhode Island urges the Commission to stay further proceedings in the instant docket because *USTA II* invalidates both: (1) the FCC's delegation of authority to the states to determine whether CLECs are impaired without access to unbundled network elements, and (2) the substantive tests that the FCC promulgated for making such determinations.<sup>8</sup> However, the Motion urges the Commission to move forward with its consideration of the proposed hot-cut processes.<sup>9</sup>

By letter to the Commission Clerk dated on March 10, 2004, Verizon Rhode Island advised the Commission that upon further review of *USTA II*, it acknowledges that this Commission does not have any mandate or cause to move forward with further consideration of the hot-cut process at this time due to the Court of Appeals' findings that vacate both the FCC's impairment standards and its delegation of authority to the states.

AT&T, Covad, DSCI and InfoHighway filed comments in opposition to Verizon's Motion urging the Commission to proceed with its investigation without further delay.<sup>10</sup> AT&T argues that this Commission would be irresponsible to ignore the deadlines embodied in the FCC's TRO and emphasized the importance of completing the fact finding that is at the core of this docket. Covad, DSCI and InfoHighway echo AT&T's urging that the Commission should complete its fact-finding efforts. AT&T,

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<sup>8</sup> Motion at 1.

<sup>9</sup> Motion at fn. 4.

<sup>10</sup> AT&T Communications of New England, Inc.'s Opposition to Verizon's Motion to Stay (March 5, 2004); DSCI and InfoHighway letter to Commission Clerk, Luly Massaro (March 5, 2004); Covad letter to Commission Clerk, Luly Massaro (March 10, 2004).

Covad, DSCI and InfoHighway contend that *USTA II* has not taken effect and likely will be stayed pending review by the United States Supreme Court because the Supreme Court has previously issued a very strong opinion in support of competition.<sup>11</sup> AT&T proceeds to argue that, contrary to Verizon Rhode Island's assertion, the Court of Appeals did not strike down the FCC's interpretation of the statutory impairment standard; to the contrary, according to AT&T, the Court of Appeals spoke favorably of the FCC's standard.

The Division has reviewed *USTA II*, Verizon's Motion, AT&T's Opposition to Verizon Rhode Island's Motion, Verizon Rhode Island's March 10, 2004 letter and the letter comments filed by Covad, DSCI and InfoHighway. The Division recommends that the Commission stay the procedural schedule (including hot-cut issues) in the instant docket for 60 days from March 2, 2004, and thereafter, until enough clarity can be garnered from associated judicial proceedings to recommence Docket 3550 or commence a like docket without wasting substantial administrative resources. At the same time, the Commission should communicate its expectation that the pre-*USTA II* status quo in Rhode Island shall be preserved pending the Commission determined stay period. Because the discovery phase of this docket has been completed for the most part, the Commission has available to it much of the information that it will need to timely complete its investigation in the event that *USTA II* is reversed. On the other hand, under the Division's recommendation, if *USTA II* is affirmed, the Commission and the

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<sup>11</sup> *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002).

parties will have avoided expending significant administrative resources unnecessarily.

Respectfully submitted,

DIVISION OF PUBLIC UTILITIES  
AND CARRIERS

By his attorneys,

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March 15, 2004

**CERTIFICATE OF SERVICE**

I certify that a copy of the within Comments were forwarded to the parties on the Service List to Docket 3550 on the \_\_\_ day of \_\_\_\_\_, 2004.